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REGULATORY EVALUATION, REGULATORY FLEXIBILITY DETERMINATION, INTERNATIONAL TRADE IMPACT ASSESSMENT, AND UNFUNDED MANDATES ASSESSMENT

FEES FOR FAA SERVICES FOR CERTAIN FLIGHTS

Interim Final Rule
(14 CFR part187)

OFFICE OF AVIATION POLICY AND PLANS
OPERATIONS REGULATORY ANALYSIS BRANCH, APO-310

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EXECUTIVE SUMMARY

This regulatory evaluation examines the economic implications of the FAA instituting a user fee for some of the services the FAA currently provides without charge to certain beneficiaries. The fee is for aircraft flights that transit U.S.-controlled airspace but do not land within or takeoff from the United States.

Implementation of the fee will impose no additional costs on society other than the cost to collect the fee. The effect of the rule will be to shift a majority of the cost of providing certain aviation services directly to the recipients of those services, and away from the U. S. taxpayer who is currently bearing all the costs. The FAA does not intend for revenues to exceed the actual cost of providing these services. Also, the cost of collection of the fee is relatively small compared to the revenue that can be generated.

During the first 12 months this rule is effective, the FAA expects to bill approximately $ 39.6 million in fees. It is estimated that the annual cost of billing and collection associated with this rule is $ 1.738 million

Several benefits will occur from the imposition of this fee. The fee will establish a mechanism whereby users cover the majority of the costs for resources needed to provide the services they use. Because revenues are earned only when services are provided, the FAA will have an

incentive to target resources toward those services that users demand. This should result in a more efficient allocation of scarce societal and FAA resources. The efficient allocation of resources will benefit society at large because more resources will become available for other services demanded by the public.

The overflight fee will primarily affect foreign users, especially commercial users. Since the Regulatory Flexibility Act does not apply to foreign entities, no consideration of the Interim Final Rule's impact on foreign users is required. In addition, the FAA believes that the impact of the Rule on small domestic operators is negligible.

The overflight fee could have a favorable competitive impact on U.S. commercial operators. Currently, U.S. commercial operators are at a competitive disadvantage with foreign counterparts when users (U.S. and foreign) must pay user fees to transit other countries' airspace while foreign users do not pay a fee to transit U. S.-controlled airspace.

This rule does not contain any Federal intergovernmental or private sector mandates. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

I. INTRODUCTION AND BACKGROUND

A standard and generally accepted concept of equity in financing services is that those who benefit directly from a service should pay for it. In many government endeavors, there are fees levied on direct beneficiaries for the services they receive. This regulatory evaluation examines the economic implications of the FAA instituting a user fee for certain services currently provided without charge to beneficiaries.

The FAA will impose a fee in this Interim Final Rule for aircraft flights that transit U.S.-controlled airspace but do not land within or takeoff from the United States. The FAA, in instituting this fee, expects to recover a large part of the costs of providing this service for those flights. No attempt is made to make a profit or collect more than the cost of service in order to subsidize other FAA services.

Authority to establish this fee can be found in the Federal Aviation Reauthorization Act of 1996 (the Act), which directs the FAA to establish a fee schedule and a collection process for air traffic control and related services provided to aircraft other than military and civilian aircraft of the U.S. government or of a foreign government that neither takeoff from, nor land in, the United States (49 U.S.C. 45301, as amended by P.L. 104-264).

On March 19, 1997, the FAA issued an Interim Final Rule establishing a fee schedule and collection process. The Rule stated the cost of FAA services provided to overflights contained both incremental costs (costs that increase as service increases) and fixed and common costs (costs for facilities and other costs that could not be attributed to particular flights or classes of flights). Due to concern that some users, such as general aviation, may change their behavior in a manner inconsistent with safety if they were required to pay the full cost of service, the FAA embraced a system of tiered fees. As such, the fee schedule for certain users of air traffic services (ATS) and related services was based on less than full cost recovery. The methodology the FAA employed distributed fixed and common costs among classes of users based on their price elasticity of demand for services. The FAA believed the fee schedule fulfilled the statutory requirements and was consistent with its primary responsibility of air traffic safety.

The United States Court of Appeals for the District of Columbia (court) on January 30, 1998 vacated the Interim Final Rule and remanded the Rule to the FAA for disposition.[1] Although the court found that the FAA adopted procedures consistent with the statutory requirements, the court also concluded that the method used to allocate costs contained a value component in its construction and therefore violated statutory direction that the fee had to be directly related to cost. Accordingly, on July 21, 1998, the FAA issued a Final Rule that removed the above rule for fees and collection procedures from the FAA's regulations.

[1] Asiana Airlines et. al. (petitioners), versus the Federal Aviation Administration and Acting Administrator (respondents), 1998 U.S. App. Lexis 1286, App. No. 97-1356 (1998).

In the removal of the Interim Final Rule, the FAA stated that the agency anticipated issuing another Interim Final Rule consistent with the Act. To ensure the fee is directly related to the cost of the services provided, (as required by the Act), the FAA is using the best data available to capture ATS costs within the enroute and oceanic environments. These costs were determined using the FAA's new Cost Accounting System.

II. INTERIM FINAL RULE

Aircraft flights that transit U.S.-controlled airspace, but neither land in nor depart from the United States, do not pay for any of the air traffic or related services that these flights receive even though they impose costs on the U.S. air traffic control (ATC) system. Congress has determined that users should bear some cost of these services. The FAA will recover these costs by instituting a user fee based on distance traversed within U.S.-controlled airspace.

The level of ATS related services provided to overflights is closely related to the amount and type of U.S.-controlled airspace such flights transit. These services include communications, navigation, radar surveillance, and flight information services. For aircraft transiting enroute airspace, Air Route Traffic Control Centers (ARTCCs) provide separation primarily by means of radar surveillance (if they are operating under instrument flight rules or in airspace above 18,000 feet). These flights also use navaids and direct radio communications with ARTCCs.

For aircraft transiting oceanic airspace, navigation is conducted primarily by on-board systems because radar surveillance and navaids are not available. However, separation is still provided by FAA under procedural control, as flights report their position to an air traffic controller each time they fly over a specified reporting point.

Charging overflights a fee for services provided is an accepted international practice. The International Civil Aviation Organization (ICAO) has stated that providers of air navigation services may require users to pay their share of costs whether or not utilization takes place over the territory of the provider state.

For example, a flight from Copenhagen, Denmark to Rio de Janeiro, Brazil usually passes through airspace controlled by France, Portugal, the United States, the Netherlands Antilles, and Venezuela, in addition to airspace controlled by Denmark and Brazil. In this case, the operator is charged by all countries except the United States for ATS related services. Similarly, a flight bound from Mexico for Frankfurt, Germany, would pay fees to Mexico, Canada, Denmark (for overflying Greenland), the United Kingdom, the Netherlands or Belgium, and Germany. The operator does not currently pay any user fees to the United States. As is evident from these two examples, there are international precedents for charging overflight aircraft the cost of providing ATS related services.

The FAA estimates that approximately 235,000 flights transit through U.S.-controlled airspace annually. This rule will apply to many of these flights. Military and civilian aircraft operators of

the U.S. government or foreign governments will be exempt as well as aircraft operators of Canada-to-Canada domestic flights.

The FAA has established and maintains a database that identifies the point of entry and exit, aircraft registration number, and the type of aircraft for all aircraft entering U.S.-controlled airspace. Information needed to compute overflight fees will be extracted from that database. The fee will be computed by a formula based on the great circle distance flown through U.S.-controlled airspace. The distance will be determined by the actual point of entry into, and the actual point of exit from, U.S.-controlled airspace.

III. ANALYSIS OF BENEFITS

In addition to authority to establish overflight fees, the Act directs the FAA to ensure that the fees are directly related to the FAA's costs of providing the service. The Act states that services for which costs may be recovered include ATC, navigation, weather services, and training. The fees collected will reimburse the FAA for the actual cost of services in the manner authorized by Congress. Thus, the actual users of the ATC and related services will pay for the actual services they receive, reducing the burden to taxpayers by an equal amount.

Charging a user fee is expected to result in better allocation of scarce societal and FAA resources. A fee will establish a mechanism through which those who use a service cover the

majority of the costs of resources necessary to fund the service that is provided. This will result in a more efficient allocation of resources, and the efficient allocation of resources will benefit society at large, because more resources will become available for other services demanded by the public.

The FAA expects to bill approximately $39.6 million in overflight fees during the first 12 months of this rule. These fees reflect the costs associated with providing ATC and related services, including billing and collections for these flights. The FAA believes the proposed fees are equitable and justified.

IV. COST OF COLLECTION OF USER FEES TO THE FAA

It is estimated that the annual cost of billing and collections associated with this rule is $1.738 million. This includes a one-time development cost of $1.550 million (which will be amortized over 2 years) and an annual operating cost of approximately $963,000.

The cost of collection will be reviewed at least once every 2 years. Fees will be adjusted to reflect the current costs of providing these services. The first review will be scheduled for no later than 2 years after the date of publication of the Final Rule.

V. COSTS AND FEES FOR FAA OVERFLIGHT SERVICES

A. Costs for Air Traffic Services for Aircraft That Overfly U.S.-Controlled Airspace

Implementation of these fees will impose no additional costs on society other than the implementation costs. The development cost to collect the fees should be recovered over the 2-year amortization period. The effect of the rule will be to shift a majority of the cost of providing services directly to the recipients of those services and away from the taxpayers.

The respective costs for providing enroute and oceanic ATC service to overflights were determined by the FAA's Cost Accounting System. The Cost Accounting System is described in the "Costing Methodology Report," a report prepared by the public accounting firm of Arthur Andersen. A copy of the report is included in the docket. This document identifies the separate costs of providing ATC service to aircraft in both enroute and oceanic airspace. The total cost for providing service to overflights is determined, for each type of airspace (enroute or oceanic), by multiplying the total cost for each type of airspace times the ratio of overflight miles to total miles within that airspace.

Using data from the Cost Accounting System, ATC costs are identified. The FAA created a second document entitled "Overflight Fee Development Report," which explains the derivation

of the fees .[2] This document is also included in the docket. Estimated overflight billings (including cost of billing and collections) is presented in Table 1.

TABLE 1
ESTIMATED OVERFLIGHT BILLINGS
(In Millions of Dollars)

U.S. CONTROL EN ROUTE	U.S. CONTROL OCEANIC	U.S. CONTROL TOTAL
$19.7	$19.9	$39.6

Source: U. S. Dept. of Trans., FAA, ABA, May, 2000

The costs associated with Canada-to-Canada flights have been removed from the cost base that overflight fees recoup. While the total cost of overflights (including the cost of billing and collections) is $50.4 million, the expected billing is $39.6 million (the difference being attributed to the FAA's relationship with NAV CANADA).

B. Air Traffic Services Fees for Aircraft That Overfly U.S.-Controlled Airspace

This rule will charge overflights for the cost of associated FAA ATC services. The FAA, in doing so, is attempting to recover the costs of current services from the beneficiaries of these services. No costs will be imposed on society as a whole other than the cost to collect the fee. The overflight fee, including cost of collection, will not exceed the actual costs of providing these services.

[2] *The Overflight Fee Development Report* was prepared by the FAA's Office of Financial Services. The purpose of the report is to derive a schedule of air traffic fees for aircraft that transit U.S.-controlled airspace, but do not land in or depart from the United States.

The overflight fee is computed based on distance flown through U.S.-controlled airspace. Separate computations are made for services provided in enroute airspace and in oceanic airspace in order to reflect the different costs of providing services in each of these environments.

The FAA will charge users $37.43 per 100-nautical miles flown in enroute airspace and $20.16 per 100 nautical miles flown in oceanic airspace. The unit cost of service for transiting enroute airspace and the unit cost of service for transiting oceanic airspace was determined by dividing the cost incurred by the FAA to provide ATC services within each type of airspace for fiscal year (FY) 99 by the number of total overflight air traffic mileage for FY 99. (See the "Costing Methodology Report" in the docket). Because the level of ATC services is identical for all aircraft operations within the enroute and oceanic environments, these unit costs reflect the directly related costs of providing ATC services to overflights on a per 100-nautical-mile basis (see Overflight Fee Development Report).

The fee for users is calculated as follows:

$$R_{ij} = (DO_{ij} \text{ X } CO) + (DE_{ij} \text{ X } CE)$$

Where

R_{ij} = the fee charged to aircraft flying between city i and city j.
DO_{ij} = distance traveled in oceanic U.S.-controlled airspace expressed in 100 nautical miles for aircraft flying between city i and city j.
CO = $20.16 per 100 nautical miles flown in oceanic airspace.
DE_{ij} = distance traveled in enroute U.S.-controlled airspace expressed in 100 nautical miles for aircraft flying between city i and city j.
CE = $37.43 per 100 nautical miles flown in enroute airspace.

Although the fees are designed to recover the costs of the services provided to each overflight, no fee will be charged unless the accumulated monthly charge equals or exceeds $250.

VI. REGULATORY FLEXIBILITY DETERMINATION

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statues, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The overflight fee should primarily affect foreign users. Since the RFA applies to domestic entities and does not apply to foreign entities, no consideration of the Interim Final Rule's impact on foreign operators is required. In addition, because no fee will be assessed to a user unless they accumulate charges that equal or exceed $250 per month, small domestic and infrequent operators should not be impacted by the rule. Accordingly, the Federal Aviation Administration certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VII. INTERNATIONAL TRADE IMPACT ASSESSMENT

The overflight provisions will primarily affect foreign users, usually commercial users. Most commercial aircraft are designed to operate more efficiently at altitudes in excess of 18,000 feet. All operations at altitudes at or above 18,000 feet controlled by the United States and its territories must be under ATC. The FAA believes that it is unlikely that foreign commercial users will alter behavior to avoid using ATS and other services. In addition, to some extent, commercial users are able to pass the overflight fee on to their passengers or cargo customers.

The Interim Final Rule may have a favorable competitive impact on U.S. commercial operators. Currently U.S. commercial operators are at a comparative disadvantage with foreign counterparts when users (U.S. and foreign) must pay user fees to transverse other countries' airspace while foreign users do not have to pay a fee to transverse U.S.-controlled Airspace. The Interim Final Rule will enhance the competitiveness of domestic commercial operators in international markets.

VIII. UNFUNDED MANDATES ASSESSMENT

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), codified in 2 U.S.C. 1501-1571, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the

private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the UMRA, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed "significant intergovernmental mandate." A "significant intergovernmental mandate" under the UMRA is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the UMRA, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This rule does not contain any Federal intergovernmental mandates or private sector mandate that exceed $100 million in any one year.